
An Introduction to Federal Sentencing

Ninth Edition

**Lucien B. Campbell and Henry J. Bemporad
Office of the Federal Public Defender
Western District of Texas**

April 2006

Table of Contents

The Basic Statutory System 1

- Guideline Sentencing 2
 - The Act's original requirements 2
 - Booker* and the advisory guidelines 2
- Guidelines and Statutory Minimums 3
 - Drug cases 3
 - Firearms cases 3
 - Sentencing below a statutory minimum 4
 - Cooperation 4
 - Safety valve 4
- No Parole; Good-Time Credit Restricted 4
- Probation and Supervised Release 4
 - Probation 4
 - Supervised release 4
 - Conditions and revocation 4
- Fines and Restitution 5
- Review of a Sentence 5
- Sentence Correction and Reduction 5
- Petty Offenses; Juveniles 6
- Statutory Amendments 6

The Guidelines Manual 6

- Chapter One: Introduction and General Application Principles 6
 - Determining the applicable guideline 6
 - Relevant conduct 7
- Chapter Two: Offense Conduct 7
 - Drug offenses 8
 - Economic offenses 8
- Chapter Three: Adjustments 8
 - Role in the offense 8
 - Obstruction 9
 - Multiple counts 9
 - Acceptance of responsibility 9
- Chapter Four: Criminal History 9
 - Criminal history departure 10
 - Repeat offenders 10
 - Career offender 10
 - Armed career criminal 10
 - Repeat child-sex offender 10

- Chapter Five: Determining the Sentence; Departures 10
 - The sentencing table 10
 - Departures 11
- Chapter Six: Sentencing Procedures and Plea Agreements 12
- Chapter Seven: Violations of Probation and Supervised Release 13
- Chapter Eight: Sentencing of Organizations 13
- Appendices 13

Applying the Guidelines 13

- Step-by-Step Guideline Application 13
- Sentencing Hearing 14

Plea Bargaining and the Guidelines 14

- Charge Bargaining 15
 - Relevant conduct 15
 - Multiple-count grouping 15
- Sentencing Recommendation; Specific-Sentence Agreement 15
- Acceptance of Responsibility 16
- Cooperation 16
- "Fast-track" dispositions 17

Some Traps for the Unwary 17

- The Weight of the Guidelines After *Booker* 17
- Pretrial Services Interview 18
- Waiver of Sentencing Appeal 18
- Presentence Investigation Report and Probation Officer's Interview 19
- Guideline Amendments 20
- Validity of Guidelines 21

More About Federal Sentencing 21

About This Publication 21

Appendices

- Sentencing Worksheets
- Sentencing Table

An Introduction to Federal Sentencing

For the past two decades, the federal government has struggled over its sentencing policy—particularly, its policy on the central issue of judicial sentencing authority. The struggle began with the Sentencing Reform Act of 1984, which replaced traditional sentencing discretion with far more limited authority, controlled by application of a complex set of mandatory federal sentencing guidelines. The struggle entered its current phase with the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), which, on constitutional grounds, excised the mandatory-guideline provisions of the Sentencing Reform Act.

While *Booker* returned discretion to the sentencing judge, the policy struggle is far from over. The Department of Justice, and some members of Congress, have called for legislation that would again place limits on sentencing discretion. If any such legislation is enacted, it will have to withstand constitutional scrutiny. What does this mean for federal defense counsel? That we must be prepared to practice in a climate of turbulent change.

DESPITE THE FUNDAMENTAL POLICY CHANGE that *Booker* represents, the decision so far has had relatively little practical effect on federal sentencing. Judges are now vested with far more sentencing discretion, but they have used that discretion sparingly, continuing as before to impose sentences within the guideline range in the majority of cases. Nevertheless, the fact that the guidelines are now advisory rather than mandatory can have a tremendous effect on a particular defendant’s case. The effect can be either positive or negative, and defense counsel must be prepared to gauge the potential benefits and risks of the advisory guidelines at every stage of a federal criminal case. The starting point is a thorough understanding of the federal sentencing process.

This paper begins by describing the statutory basis of guideline sentencing, as altered by the Supreme Court in *Booker*. It then reviews the structure of the guide-

lines, explains how they are calculated in a typical case, discusses plea bargaining, and warns of traps for the unwary. The treatment is far from exhaustive; this paper provides no more than an overview to facilitate gaining a working knowledge of the federal sentencing system as it now stands.

The Basic Statutory System

The Sentencing Reform Act created determinate sentences: by eliminating parole and greatly restricting good time, it ensured that defendants would serve nearly all the sentence that the court imposed. The responsibility for shaping these determinate sentences was delegated to the United States Sentencing Commission, an independent body within the judicial branch. Congress gave the Commission the mandate to provide “certainty and fairness” in sentencing, avoiding “unwarranted sentencing disparities” while “maintain-

ing sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors.” 28 U.S.C. § 991(b)(1)(B).

Delegation to the Commission did not end congressional involvement, however. Over the years, Congress has mandated particular punishment for certain offenses or sentencing factors, specifically directed the Commission to promulgate particular guideline amendments, and even drafted guidelines itself.¹ Meanwhile, the Sentencing Reform Act has been subject to review and interpretation by the courts, culminating in the significant judicial excisions of *Booker*.

Guideline Sentencing. Under the Act as originally written, the district court’s sentencing authority was greatly restricted by the Sentencing Commission. The Act directed the court to consider a broad variety of purposes and factors before imposing sentence, including “guidelines” and “policy statements” promulgated by the Commission. 18 U.S.C. § 3553(a)(4)(A), (a)(5); *see also* 28 U.S.C. § 994(a)(1), (a)(2). But while it provided for a broad range of considerations, the Act did not grant an equally broad range of sentencing discretion. The court’s discretion was cabined within a grid of sentencing ranges established by the guidelines, and the sentence imposed was subject to a variety of standards of review on appeal. 18 U.S.C. §§ 3553(b), 3742(e). These provisions were substantially altered by *Booker*.

The Act’s original requirements. Section 3553(b) was drafted to constrain the court’s sentencing power. Regardless of the kind of sentences or range of punishment permitted by the statute of conviction, the section limited the court to a sentence of the kind, and within the range specified, in the applicable guideline, absent a valid ground for departure. § 3553(b)(1), (b)(2). In most cases, a departure was authorized only when the court found “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” § 3553(b)(1); *cf.* United States Sentencing Guideline (U.S.S.G.) §1B1.1, comment. (n.1(E)) (defining “departure”).

Booker and the advisory guidelines. The Supreme Court’s decision in *Booker* fundamentally changed § 3553. Applying a recent line of constitutional decisions,² *Booker* held that § 3553(b) violated the Sixth Amendment right to jury trial by providing for mandatory sentencing enhancement based on judicial fact finding. 543 U.S. at 226, 243–44. To remedy this constitutional violation, the Court excised the mandatory provisions in 18 U.S.C. § 3553(b)(1), rendering the guidelines advisory. *Id.* at 226, 245.

After *Booker*, the Commission’s guidelines and policy statements must still be considered, but they need not be followed in any particular case. 543 U.S. at 259–60. They have no primacy over the other factors to be considered under § 3553(a)—the nature and circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, the need to avoid unwanted sentencing disparities among similarly situated defendants, and the need to provide restitution to any victims of the offense. § 3553(a)(1), (a)(3), (a)(6), (a)(7); *see Booker*, 543 U.S. at 259–60 (discussing factors to be considered under § 3553(a)).

In addition to setting out the factors that the sentencing court must consider, § 3553(a) includes a “parsimony” provision. This provision requires the court to “impose a sentence sufficient, but not greater than necessary,” to achieve Congress’s specific sentencing purposes: reflecting the seriousness of the offense, promoting respect for the law, providing just punishment, affording adequate deterrence, protecting the public from further crimes, and providing the defendant with needed training, medical care, or other correctional treatment. § 3553(a)(2). Beyond this requirement, and the procedural requirement that the court give reasons for the sentence it selects, § 3553(c), the Sentencing Reform Act as modified by *Booker* places no restriction on the sentence the court may impose within the limits of the statute of conviction. And the only restriction *Booker* places on the court is that its sentence be “reasonable” (See the discussion of *Booker*’s effect on appeals below.)

1. *See, e.g.*, Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (Apr. 30, 2003).

2. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding facts which increase the statutory maximum penalty must be proved to the jury beyond a reasonable doubt); *Ring v. Arizona*, 536 U.S. 584, 602 (2002) (applying *Apprendi* to facts that justify imposition of the death penalty); *Blakely v. Washington*, 542 U.S. 296, 303–08 (2004) (applying *Apprendi* to state guideline system).

Booker returned a tremendous amount of sentencing discretion to the court. It did not however, diminish the importance of understanding the guidelines' application in a particular case. This is not just because the guidelines must be considered under § 3553(a); statistics show that, even after *Booker*, courts have continued to follow the guidelines' recommendation when imposing most sentences.³

Often, the guidelines call for a sentence that appears greater than necessary to achieve the sentencing purposes of § 3553(a)(2). In some cases, however, the applicable guideline range is lower than the sentence a court may be inclined to impose. Counsel must understand the applicable guideline range to determine whether, in a particular case, it hurts or helps the defendant.

Guidelines and Statutory Minimums. While *Booker* increased sentencing discretion, it did not supersede the statutory sentencing limits for the offense of conviction. Even if the guidelines or other § 3553(a) factors appear to warrant a sentence below the statutory minimum, or above the statutory maximum, the statutory limit controls. *See Booker*, 543 U.S. at 233 (absent mandatory guidelines, sentence could be imposed anywhere within statutory limits); *cf.* U.S.S.G. §5G1.1 (statutory limits trump recommended guideline range).

A number of federal statutes include minimum prison sentences; some, like the federal "three strikes" law, 18 U.S.C. § 3559(c), mandate life imprisonment. Most commonly, defendants face statutory minimum sentences in two types of federal prosecutions: drug cases and firearms cases.⁴

Drug cases. The federal drug statutes include two types of commonly applied mandatory minimum sen-

tences. One is based on the amount of drugs involved; for certain drugs in certain quantities, 21 U.S.C. §§ 841(b) and 960(b) provide minimum sentences of 5 or 10 years' imprisonment. The circuits are divided over whether drug amount must be alleged in the indictment and proved to the jury to trigger the statute's mandatory minimum sentences.⁵

The other type of mandatory minimum is based on criminal history; for a defendant who has previously been convicted of one or more drug offenses, the statutes establish minimum sentences of up to life imprisonment. The prior conviction need not be alleged in the indictment or proved at trial; however, the government must follow the notice and hearing procedures of 21 U.S.C. § 851 to obtain a recidivism-based enhancement.

Firearms cases. Title 18 U.S.C. § 924, which sets out the penalties for most common federal firearm-possession offenses, includes two subsections that require significant minimum prison sentences. One is § 924(c), which punishes firearm possession during a drug-trafficking or violent crime. It provides graduated minimum sentences, starting at 5 years and increasing to a fixed sentence of life imprisonment, depending on the type of firearm, how it was employed, and whether the defendant has a prior § 924(c) conviction. The statute requires that a sentence under § 924(c) run consecutively to any other sentence. A § 924(c) charge is often (but not always) accompanied by a charge on the underlying substantive offense. Special guidelines rules apply to § 924(c), based on the number of counts, the mandatory consecutive nature of the penalty, and the defendant's criminal history. U.S.S.G. §2K2.4, §4B1.1(c), §5G1.2(e).

The other firearm mandatory minimum is found in 18 U.S.C. § 924(e), the Armed Career Criminal Act. This statute provides the applicable penalty for certain defendants convicted of unlawful firearm possession under § 922(g). A defendant convicted under § 922(g)

3. After *Booker*, the courts have imposed sentences within the guideline range 62 percent of the time. *See* U.S. Sentencing Comm'n, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 62, tbl. 1 (Mar. 2006), http://www.ussc.gov/booker_report/Booker_Report.pdf (hereinafter *Final Report*). In the years 1996 to 2003, the percentage of within-range sentences varied between 64 and 69 percent. *See* U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics* fig. G (2003).

4. Mandatory minimum sentences are also applicable for some child-sex and immigration offenses. *See, e.g.*, 18 U.S.C. § 2241(c) (aggravated child sexual abuse), § 2251(e) (child sexual exploitation); 8 U.S.C. § 1324(a)(2)(B)(ii) (bringing aliens into the United States for commercial gain).

5. Compare *United States v. Leachman*, 309 F.3d 377, 381–83 (6th Cir. 2002) (drug quantity setting statutory minimum is a sentencing factor that need not be proved to jury beyond reasonable doubt) (citing *Harris v. United States*, 536 U.S. 545 (2002)), with *United States v. Velasco-Heredia*, 319 F.3d 1080, 1084–86 (9th Cir. 2003) (minimum drug sentence inapplicable without proof to jury beyond reasonable doubt) (distinguishing *Harris*), and *United States v. Vaughn*, 430 F.3d 518, 528 (2d Cir. 2005) (same).

normally faces a maximum term of 10 years' imprisonment. Section 924(e)(1) increases this punishment range, to a minimum of 15 years and a maximum of life imprisonment, if a defendant has three prior convictions for violent felonies or serious drug offenses. "Violent felony" and "serious drug offense" are defined by statute. § 924(e)(2); *see Shepard v. United States*, 544 U.S. 13 (2005) (interpreting "violent felony" definition in § 924(e)(2)(B)). Unlike the drug laws, however, § 924(e) provides no notice or hearing requirements before an enhanced sentence may be imposed based on prior convictions.

Sentencing below a statutory minimum. Section 3553 authorizes a sentence below a statutory minimum in only two circumstances: when a defendant cooperates and when he meets the requirements of a limited "safety valve."

Cooperation. The court, on motion by the government, may "impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 18 U.S.C. § 3553(e); *see also* § 3553(b)(2)(A)(iii) (governing substantial assistance in child-sex cases); FED. R. CRIM. P. 35(b) (setting out rules for government cooperation motions). Sentencing Commission policy statement §5K1.1, discussed in more detail below, sets out the factors to be considered in imposing sentence on a government substantial-assistance motion. However, a substantial-assistance motion will not authorize a sentence below the statutory minimum unless the government specifically requests such a sentence. *Melendez v. United States*, 518 U.S. 120 (1996).

Safety valve. Under 18 U.S.C. § 3553(f), the statutory minimum is removed for certain drug crimes that did not result in death or serious injury, if the court finds that the defendant has minimal criminal history; was not violent, armed, or a high-level participant; and provided the government with truthful, complete information regarding the offense of conviction and related conduct. Unlike § 3553(e), the § 3553(f) "safety valve" does not require a government motion, but the government must be allowed to make a recommendation to the court. The Sentencing Commission has promulgated a safety-valve guideline, §5C1.2, which mirrors the requirements of § 3553(f), but which may reduce the recommended guideline range even when no statutory minimum is in play.

No Parole; Good-Time Credit Restricted. Federal prisoners do not receive parole, and they can receive only limited credit to reward satisfactory behavior in prison. Credit is fixed at a maximum of 54 days per year for a sentence greater than one year, but less than life. 18 U.S.C. § 3624(b). The Bureau of Prisons may reduce the time to be served by up to an additional year if a prisoner serving imprisonment for a nonviolent offense completes a substance-abuse treatment program. § 3621(e)(2).

Probation and Supervised Release. While the Sentencing Reform Act does not allow parole, it does authorize courts to impose non-incarcerative sentences of two types: probation and supervised release.

Probation. Probation may be imposed in lieu of imprisonment in very limited circumstances. Probation is prohibited by statute (1) for Class A or Class B felonies (offenses carrying maximum terms of 25 years or more, life, or death); (2) for offenses that expressly preclude probation; and (3) for a defendant who is sentenced at the same time to imprisonment for a non-petty offense. 18 U.S.C. § 3561(a). Even when probation is statutorily permitted, the guidelines do not provide for straight probation unless the bottom of the guideline range is zero. *See* U.S.S.G. §5B1.1(a), §5C1.1(b). (See discussion of Chapter Five below, under "The Guidelines Manual.")

Supervised release. Unlike probation, supervised release is imposed in addition to an imprisonment sentence. Some statutes mandate imposition of supervised release, and the guidelines generally call for supervised release following any imprisonment sentence greater than 1 year. U.S.S.G. §5D1.1(a). Under 18 U.S.C. § 3583(b), the authorized maximum supervised-release terms increase with the grade of the offense, from 1 year, to 3 years, to 5 years. The specific statute of conviction may provide for a longer term. Supervised release begins on the day the defendant is released from imprisonment and runs concurrently with any other term of release, probation, or parole. § 3624(e); *United States v. Johnson*, 529 U.S. 53 (2000).

Conditions and revocation. The court has discretion in imposing some conditions of probation and supervised release. However, federal law makes a number of conditions mandatory, including that the defendant submit to DNA collection in some cases, and to drug testing in all cases. 18 U.S.C. §§ 3563(a)(5), (a)(9), 3583(d). The court may ameliorate or suspend the drug-

testing condition if the defendant presents a low risk of future substance abuse.

Probation or supervised release may be revoked upon violation of any condition. Revocation is mandatory for possessing a firearm or a controlled substance, refusing to comply with drug-testing conditions, or testing positive for an illegal controlled substance more than three times over the course of a year. 18 U.S.C. §§ 3565(b), 3583(g). There may be an exception from mandatory revocation for failing a drug test, depending on the availability of treatment programs, and the defendant's participation in them. §§ 3563(e), 3583(d).

Upon revocation of probation, the court may impose any sentence under the general sentencing provisions available in 18 U.S.C. chapter 227, subchapter A. § 3565(a)(2). Upon revocation of supervised release, the court may imprison the defendant up to the maximum terms listed in § 3583(e)(3), even if the listed sentence is longer than the term of supervised release originally imposed. If the court imposes less than the maximum prison term on revocation of supervised release, it may impose another supervised release term to begin after imprisonment. § 3583(h).

The Sentencing Commission has promulgated policy statements for determining the propriety of revocation and the sentence to be imposed. U.S.S.G. Ch.7. (See discussion of Chapter Seven below, under "The Guidelines Manual.")

Fines and Restitution. Federal sentencing law authorizes both fines and restitution orders. In general, the maximum fine for an individual convicted of a Title 18 offense is \$250,000 for a felony, \$100,000 for a Class A misdemeanor, and \$5,000 for any lesser offense. 18 U.S.C. § 3571(b). A higher maximum fine may be specified in the law setting forth the offense, § 3571(b)(1), and an alternative fine based on gain or loss is possible, § 3571(d). Restitution can be ordered for any Title 18 crime and most common drug offenses. 18 U.S.C. § 3663(a)(1)(A). It is mandatory for crimes of violence, property crimes, and product tampering, § 3663A(c), and when required by the statute setting out the substantive offense.⁶ A defendant who knowingly fails to pay a delinquent fine or restitution is

subject to resentencing, and a defendant who willfully fails to pay may be prosecuted for criminal default. §§ 3614, 3615.

While the guidelines ordinarily call for both fines and restitution, a defendant's inability to pay, now and in the future, may support restitution payments that are only nominal. U.S.S.G. §5E1.1(f). It may also support a lesser fine, or alternatives such as community service. §5E1.2(e).

Review of a Sentence. In addition to rendering the guidelines advisory, *Booker* significantly changed the scope of appellate review of federal sentences. The Sentencing Reform Act allows both the government and the defendant to appeal a federal sentence; before *Booker*, 18 U.S.C. § 3742(e) provided the standard of review for these appeals. Because § 3742(e) referred to § 3553(b), the Supreme Court excised the provision, replacing it with a requirement that federal sentences be reviewed for "reasonableness." *Booker*, 543 U.S. at 260–63.

Booker did not discuss the other provisions in § 3742, which govern the right to appeal, the disposition that the appellate court may order, and sentencing on remand.⁷ Section 3742 includes a provision limiting appellate rights if the parties enter into a plea bargain that agrees to a specific sentence. § 3742(c); *see also* FED. R. CRIM. P. 11(c)(1)(C) (describing specific-sentence agreement). (See discussion of Rule 11(c)(1)(C) below, under "Plea Bargaining and the Guidelines," and discussion of appeal waivers below, under "Some Traps for the Unwary.")

Sentence Correction and Reduction. Federal law strictly limits the sentencing court's authority to correct or reduce a sentence after it is imposed. Under Federal Rule of Criminal Procedure 35(a), the court may correct

6. For the effect of *Apprendi*, *Blakely*, and *Booker* on restitution orders, see the majority and concurring opinions in *United States v. Leahy*, 438 F.3d 328 (3d Cir. 2006) (en banc).

7. The *Booker* Court stated that its ruling affected only § 3553(b)(1) and 3742(e), but lower courts have had to gauge the impact of *Booker* on a variety of other provisions of the Act. *See, e.g., United States v. Selioutsky*, 409 F.3d 114, 116–17 (2d Cir. 2005) (*Booker's* reasoning requires excision of § 3553(b)(2)); *United States v. Labrada-Bustamante*, 428 F.3d 1252, 1262–63 (9th Cir. 2005) (considering *Booker's* effect on § 3553(f)); *United States v. Williams*, 411 F.3d 675, 678 (6th Cir. 2005) (same, § 3742(g)). *Cf. Booker*, 543 U.S. at 307 n.6 (Scalia, J., dissenting) (suggesting that § 3742(f) cannot function once §§ 3553(b)(1) and 3742(e) are excised).

“arithmetical, technical, or other clear error” in the sentence within 7 days after sentencing.⁸

Rule 35(b) authorizes the court to reduce the sentence on motion of the government, to reflect a defendant’s post-sentence assistance in the investigation or prosecution of another person who has committed an offense. With limited exceptions, the rule requires that the motion must be made within one year after sentencing.

In two other circumstances, sentence reduction is authorized under 18 U.S.C. § 3582(c): (1) on motion of the Director of the Bureau of Prisons, if the court finds that “extraordinary and compelling reasons warrant such a reduction”; and (2) for a defendant whose sentencing range was later lowered by a guideline amendment designated as retroactive by the Sentencing Commission. (See discussion of guideline amendments below, under “Some Traps for the Unwary.”)

Petty Offenses; Juveniles. The Sentencing Reform Act does not exempt petty offenses (offenses carrying a maximum term of 6 months or less) or juvenile delinquency cases. The Sentencing Commission, however, has chosen not to promulgate separate guidelines applicable to these cases. U.S.S.G. §1B1.9, §1B1.12, p.s. The Supreme Court discussed the interplay of the guidelines and the federal Juvenile Delinquency Act in *United States v. R.L.C.*, 503 U.S. 291 (1992) (construing 18 U.S.C. § 5037(c)(1)(B)).

Statutory Amendments. The Sentencing Reform Act has been amended on numerous occasions in the 20 years since it first became law. Retroactive application of those amendments may violate the Ex Post Facto Clause, if the amendment is both substantive and harmful. See *Johnson v. United States*, 529 U.S. 694, 699–701 (2000) (discussing effect of Ex Post Facto Clause on Act’s amended provisions regarding supervised-release revocation); cf. *Lynce v. Mathis*, 519 U.S. 433 (1997) (retroactive amendment of state sentencing law awarding reduced jail credits violated Ex Post Facto).⁹

8. This time limit may not be jurisdictional. Cf. *Eberhart v. United States*, 126 S. Ct. 403 (2005) (Rules 33 and 45 are claim-processing rules; 7-day time limit for motion for new trial is nonjurisdictional).

9. After *Booker*, a number of defendants have argued that the Supreme Court’s remedial excision of § 3553(b) should be subject to a due process equivalent of the ex post facto limitation. See generally *Rogers v. Tennessee*, 532 U.S. 451 (2001) (explaining the due process analogue to ex post facto,

The Guidelines Manual

The *Guidelines Manual* contains the guidelines, policy statements, and commentary promulgated by the Sentencing Commission for consideration when a court imposes sentence in a federal case. See 18 U.S.C. § 3553(a)(4)(A) (court must consider guidelines); § 3553(a)(5) (court must consider policy statements). The *Manual* establishes two numerical values for each guidelines case: an offense level and a criminal history category. The two values correspond to the axes of a grid, called the sentencing table; together, they specify a sentencing range for each case. (The sentencing table is appended to this paper.) The *Manual* provides rules for sentencing within the range, and for departures outside of it. Although the guidelines are advisory only, every circuit has held that the applicable guideline range remains the starting point for the federal sentencing decision.¹⁰ Counsel should therefore expect that the guideline range, and departure grounds provided by the *Manual*, will be seriously considered by the court.

The *Manual* comprises eight chapters and three appendices. To undertake the defense of a guidelines case, counsel must have a thorough understanding of Chapters One, Three, Four, Five, and Six, as well as all sections of Chapter Two, Offense Conduct, that may arguably apply to the case. In defending a revocation of probation or supervised release, counsel must study the policy statements in Chapter Seven. If the defendant is an organization, Chapter Eight, Sentencing of Organizations, applies.

Chapter One: Introduction and General Application Principles. Chapter One provides a historical introduction to the guidelines and important definitions that apply throughout the *Manual*. It also sets the rules for determining the applicable guideline and explains the all-important concept of “relevant conduct.”

Determining the applicable guideline. The applicable guideline section is usually determined by offense of conviction—the conduct “charged in the count of the indictment or information of which the defendant was convicted.” U.S.S.G. §1B1.2(a). (See further discussion of offense guidelines below, under “Chapter Two: Of-

applicable to judicial statutory constructions). The courts of appeals have rejected this argument. See *Vaughn*, 430 F.3d at 524–25 (collecting cases).

10. See *Final Report* 20 & n.147 (collecting cases).

fense Conduct”). If two or more guideline sections appear equally applicable, the court must use the section that results in the higher offense level. §1B1.1, comment. (n.5). Additionally, if a plea agreement “contain[s] a stipulation that specifically establishes a more serious offense,” the court must consider the guideline applicable to the more serious stipulated offense. U.S.S.G. §1B1.2(a). For this exception to apply, the stipulation must establish every element of the more serious offense, *Braxton v. United States*, 500 U.S. 344 (1991), and the parties must “explicitly agree that the factual statement or stipulation is a stipulation for such purposes.” §1B1.2, comment. (n.1).

Relevant conduct. Although the initial choice of guideline section is tied to the offense of conviction, important guideline determinations are frequently made according to the much broader concept of relevant conduct. The Commission developed the concept as part of its effort to create a modified “real offense” sentencing system—a system under which the court punishes the defendant based on its determination of his actual conduct, not the more limited conduct of which he may have been charged or convicted. See U.S.S.G. §1A1.1, editorial note, Pt.A(4)(a). Because the relevant-conduct-based sentencing determined the defendant’s punishment without proof to a jury beyond a reasonable doubt, it was declared unconstitutional by *Booker*. 543 U.S. at 243–44. The constitutional remedy the Court prescribed did not bar the use of relevant conduct, however; it simply made the resulting guideline range advisory.¹¹

The relevant conduct guideline requires sentencing based on “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.” §1B1.3(a)(1)(A). For many offenses, such as drug crimes, relevant conduct extends further, to “acts and omissions” that were not part of the offense of conviction but “were part of the same course of conduct or

common scheme or plan as the offense of conviction.” §1B1.3(a)(2).

When others were involved in the offense, §1B1.3 includes their conduct—whether or not a conspiracy is charged—so long as the conduct was (1) reasonably foreseeable and (2) in furtherance of the jointly undertaken criminal activity. §1B1.3(a)(1)(B). The scope of the criminal activity jointly undertaken by the defendant is not necessarily the same as the scope of the entire conspiracy, and relevant conduct does not include the conduct of conspiracy members before the defendant joined, even if the defendant knows of that conduct. §1B1.3, comment. (n.2).

Relevant conduct need not be included in formal charges. §1B1.3, comment. (backg’d). It can include conduct underlying dismissed or even acquitted counts, provided the sentencing judge finds the conduct was reliably established by a preponderance of the evidence. *United States v. Watts*, 519 U.S. 148 (1997) (per curiam).¹²

While relevant conduct affects every stage of representation, it is especially important in the context of plea bargaining. (See discussion of relevant conduct below, under “Plea Bargaining and the Guidelines.”)

Chapter Two: Offense Conduct. Offense conduct forms the vertical axis of the sentencing table. Offense conduct guidelines are set out in Chapter Two. The chapter has 18 parts; each part has multiple guidelines, linked to particular statutory offenses. A single guideline may cover one statutory offense, or many. When no guideline has been promulgated for an offense, §2X5.1 applies. Part X also provides the guidelines for certain conspiracies, attempts, and solicitations, as well as aiding and abetting, accessory after the fact, and misprision of a felony.

11. At least one court of appeals has held that the use of relevant conduct to determine the guideline range did not, by itself, make a guideline sentence unreasonable under *Booker*. *United States v. Alonzo*, 435 F.3d 551, 553 (5th Cir. 2006).

12. A number of circuits have held that *Watts*’s holding survives *Booker*. See, e.g., *United States v. Price*, 418 F.3d 771, 788 & n.7. (7th Cir. 2005) (collecting cases). But see *United States v. Coleman*, 370 F. Supp. 2d 661, 669–70 (S.D. Ohio 2005) (contrary to *Watts*, refusing to rely on acquitted conduct in setting offense level); *United States v. Edwards*, 424 F.3d 1106, 1108 (D.C. Cir. 2005) (declining to decide “potentially important question” of *Watts*’s continuing validity post-*Booker*); cf. *Vaughn*, 430 F.3d at 527 (while *Watts* remains good law, courts should consider weight of evidence presented in determining reasonable sentence).

Each guideline provides one or more base offense levels for a particular offense. A guideline may also have specific offense characteristics that adjust the base level up or down, and it may cross-reference other guidelines that yield a higher offense level. The court will normally look to relevant conduct in choosing among multiple base offense levels, determining offense characteristics, and applying cross-references.

Some Chapter Two guidelines significantly increase the offense level based on prior convictions, even though these convictions are also used to increase the criminal history score on the horizontal axis of the sentencing table. *See, e.g.*, §2K1.3(a) (providing higher base offense levels based on prior violent or drug convictions); §2K2.1 (same); §2L1.2 (using prior conviction as special offense characteristics). Other guidelines in the Chapter have commentary encouraging departures from the prescribed offense level. *See, e.g.*, §2B1.1, comment. (n.19) (encouraging upward or downward departures for some economic offenses); §2D1.1, comment. (n.14) (downward departure in certain reverse-sting drug cases); *id.* (n.16) (upward departure for very large scale drug offenses).

Drug offenses. In drug and drug-conspiracy cases, the offense level is generally determined by drug type and quantity, as set out in the drug quantity table in guideline §2D1.1(c). The table includes a very wide range of offense levels, from a low of 6 to a high of 38; for defendants who played a mitigating role in the offense, the top four offense levels are reduced by 2 to 4 levels. U.S.S.G. §2D1.1(a)(3). (See discussion of role in the offense below, under “Chapter Three: Adjustments.”)

Unless otherwise specified, the applicable offense level is determined from “the entire weight of any mixture or substance containing a detectable amount of the controlled substance.” U.S.S.G. §2D1.1(c) (drug quantity table) note *(A). “Mixture or substance” does not include “materials that must be separated from the controlled substance” before it can be used. §2D1.1, comment. (n.1). When no drugs are seized or “the amount seized does not reflect the scale of the offense,” the court must “approximate the quantity.” *Id.* comment. (n.12). In conspiracy cases, and other cases involving agreements to sell controlled substances, the agreed-upon quantity is used to determine the offense level, unless the completed transaction establishes a different quantity, or the defendant demonstrates that he

did not intend to produce the negotiated amount or was not reasonably capable of producing it. *Id.* With the exceptions of methamphetamine, amphetamine, PCP, and oxycodone, drug purity is not a factor in determining the offense level. However, “unusually high purity may warrant an upward departure.” *Id.* comment. (n.9).

The drug guidelines include provisions that raise the offense level for specific aggravating factors, such as death, serious bodily injury, or possession of a firearm. Guideline §2D1.1(b)(9) provides a 2-level reduction if the defendant meets the criteria of the safety-valve guideline, §5C1.2. If the defendant is subject to a statutory minimum of 5 years, however, the guideline establishes a minimum offense level of 17. §5C1.2(b).

Economic offenses. For many economic offenses (including theft, fraud, and property destruction) the offense level is determined under §2B1.1. The guideline is similar in structure to the drug-offense guideline, in that the offense level is generally driven by an amount—the amount of loss. The guideline broadly defines “loss” as the greater of actual loss or the loss the defendant intended, even if the intended loss was “impossible or unlikely to occur.” §2B1.1, comment. (n.3(A)(ii)). In addition to its broad definition of loss, the guideline includes many specific offense adjustments that can increase the offense level.

Chapter Three: Adjustments. Chapter Three sets out general offense level adjustments that apply in addition to the offense-specific adjustments of Chapter Two. Some of these adjustments relate to the offense conduct: victim-related adjustments, adjustments for hate crimes or terrorism, adjustments for the defendant’s role in the offense, and adjustments for the defendant’s use of position, of special skills, of minors, and (in certain cases) of body armor. Other Chapter Three adjustments relate to post-offense conduct, including flight from authorities and obstruction of justice, as well as acceptance of responsibility for the offense. Chapter Three also provides the rules for determining the guideline range when the defendant is convicted of multiple counts.

Role in the offense. In any offense committed by more than one participant, a defendant may receive an upward adjustment for aggravating role or a downward adjustment for mitigating role. U.S.S.G. Ch.3, Pt.B, intro. comment. Aggravating-role adjustments range from 2 to 4 levels, depending on the defendant’s supervisory status and the number of participants in the of-

fense. §3B1.1. Mitigating-role adjustments likewise range from 2 to 4 levels, depending on whether the defendant's role is characterized as minor, minimal, or somewhere in between. §3B1.2. The determination of a defendant's role is made on the basis of all relevant conduct, not just the offense of conviction. Accordingly, even when the defendant is the only person charged in the indictment, he may face an upward adjustment (or seek a downward adjustment) if more than one person participated. However, the fact that a defendant is not accountable for the relevant conduct of others does not disqualify him from receiving a reduced offense level. §3B1.2, comment. (n.3(A)).

Obstruction. A defendant who willfully obstructed the administration of justice will receive a 2-level upward guideline adjustment. U.S.S.G. §3C1.1. Obstruction of justice can occur during the investigation, prosecution, or sentencing of the offense of conviction, of relevant conduct, or of a closely related offense. Conduct warranting the adjustment includes committing or suborning perjury,¹³ destroying or concealing material evidence, or “providing materially false information to a probation officer in respect to a presentence or other investigation for the court.” §3C1.1, comment. (n.4). Some uncooperative behavior or misleading information, such as lying about drug use while on pretrial release, ordinarily does not justify an upward adjustment. *Id.* comment. (n.5). While fleeing from arrest does not ordinarily qualify as obstruction, *id.*, reckless endangerment of another during flight will support a separate upward adjustment under §3C1.2.

Multiple counts. When a defendant has been convicted of more than one count, the multiple-count guidelines of Chapter Three, Part D must be applied. These guidelines produce a single offense level by grouping counts together, assigning an offense level to the group, and, if there is more than one group, combining the group offense levels together.

The guidelines group counts together when they involve “substantially the same harm,” §3D1.2, unless a statute requires imposition of a consecutive sentence. §3D1.1(b); *see also* § 5G1.2 (providing rules for sen-

tencing on multiple counts, and for imposing statutorily required consecutive sentences). If the offense level is based on aggregate harm (such as the amount of theft losses or the weight of controlled substances), the level for the group is determined by the aggregate for all the counts combined. §3D1.3(b). Otherwise, the offense level for the group is the level for the most serious offense. §3D1.3(a). When there is more than one group of counts, §3D1.4 usually requires an increase in the offense level to account for them. The combined offense level can be up to 5 levels higher than the level of any one group. Even when a defendant pleads guilty to a single count, a multiple-count adjustment may increase the offense level if the plea agreement stipulates to an additional offense, or if the conviction is for conspiracy to commit more than one offense. §1B1.2(c)–(d) & comment. (n.4). (See discussion of grouping below, under “Plea Bargaining and the Guidelines.”)

Acceptance of responsibility. Chapter Three, Part E provides a downward adjustment of 2 or, in certain cases, 3 offense levels for acceptance of responsibility by the defendant. To qualify for the 2-level reduction, a defendant must “clearly demonstrate[] acceptance of responsibility for his offense.” §3E1.1(a). Pleading guilty provides “significant evidence” of acceptance of responsibility, but does not win the adjustment as a matter of right. §3E1.1, comment. (n.3). On the other hand, a defendant is not “automatically preclude[d]” from receiving the adjustment by going to trial. *Id.* comment. (n.2). A defendant who received an upward adjustment for obstruction under §3C1.1, however, is not ordinarily entitled to a downward adjustment for acceptance of responsibility. *See* §3E1.1, comment. (n.4).

Defendants qualifying for the 2-level reduction receive a third level off if the offense level is 16 or greater and the government files a motion stating that the defendant has timely notified authorities of his intention to plead guilty. §3E1.1(b). (The adjustment for acceptance is discussed more fully below, under “Plea Bargaining and the Guidelines.”)

Chapter Four: Criminal History. The defendant's criminal history forms the horizontal axis of the sentencing table. The table includes six criminal history categories; the guidelines in Chapter Four, Part A translate the defendant's prior record into one of these categories by assigning points for qualifying prior convic-

13. To support an obstruction adjustment based on perjury at trial, the court must “make independent findings necessary to establish a willful impediment to or obstruction of justice,” or an attempt to do so, within the meaning of the federal perjury statute. *United States v. Dunnigan*, 507 U.S. 87, 95 (1993).

tions and juvenile adjudications. The number of points scored for a prior conviction is based primarily on length of the sentence imposed. U.S.S.G. §4A1.1. There is also a recency factor: points are added for committing the instant offense within 2 years after release from imprisonment for certain prior convictions, or while under any form of criminal justice sentence. §4A1.1(d), (e).

A prior conviction is not counted in the criminal history score if it was sustained for conduct that was part of the instant offense. *See* §4A1.2(a)(1). Other criminal convictions or juvenile adjudications are not counted because of staleness, their minor nature, or other reasons, such as constitutional invalidity. §4A1.2(c)–(j).¹⁴ And sentences imposed in “related” cases are treated as one sentence for the criminal history calculation. §4A1.2(a)(2) & comment. (n.3).

Criminal history departure. An important policy statement authorizes a departure from the guideline range when a defendant’s criminal history category does not adequately reflect the seriousness of past criminal conduct or the likelihood that the defendant will commit other crimes. U.S.S.G. §4A1.3, p.s. This policy statement may support either an upward or a downward departure. It does not, however, provide for departures below criminal history category I. §4A1.3(b)(2). (For the rules generally governing departures and other non-guideline sentences, see discussion of Chapter Five below).

Repeat offenders. For certain repeat offenders, Chapter Four, Part B significantly enhances criminal history scores and offense levels, and policy statement §4A1.3 prohibits or limits downward departures. These offenders fall in three classes: career offenders, armed career criminals, and repeat child-sex offenders.

Career offender. The “career offender” guideline, §4B1.1, applies to a defendant convicted of a third crime of violence or a controlled substance offense. In every case, §4B1.1 places the defendant in the highest criminal history category, VI. The guideline simultaneously increases the offense level to produce a guideline range approximating the statutory maximum for the

offense of conviction. Guideline 4B1.2 defines “crime of violence” and “controlled substance offense” for career-offender purposes, and for a number of Chapter Two guidelines as well. The rules for computing criminal history apply in determining whether prior convictions qualify a defendant as a career offender, §4B1.2, comment. (n.3); therefore, questions of remoteness, invalidity, or whether prior convictions were “related” may be of utmost importance.

Armed career criminal. Guideline §4B1.4 applies to a person convicted under the Armed Career Criminal Act, 18 U.S.C. § 924(e); it frequently produces a guideline range above that statute’s mandatory minimum 15-year term. Like the career offender guideline, the armed career criminal guideline operates on both axes of the sentencing table. Unlike the career offender guideline, however, §4B1.4 is not limited by guideline §4A1.2’s rules for counting prior sentences. §4B1.4, comment. (n.1). And, unlike a career offender, an armed career criminal is not automatically placed in criminal history category VI. Nevertheless, an armed career criminal cannot receive a score below category IV. §4B1.4(c).

Repeat child-sex offender. For repeat child-sex offenders, guideline §4B1.5 works in concert with the career offender guideline to provide for long imprisonment terms. The guideline sets the minimum criminal history category at V, and it reaches more defendants than §4B1.2, applying career offender offense levels to a defendant even if he has only one prior child-sex offense. §4B1.5(a)(1). Even a defendant with no prior child-sex conviction may be subject to a significant offense level increase, if he “engaged in a pattern of activity involving prohibited sexual conduct.” §4B1.5(b).

While §4B1.5 covers a broad range of child-sex offenses, it does not apply to trafficking in, receipt of, or possession of child pornography. §4B1.5, comment. (n.2).

Chapter Five: Determining the Sentence; Departures. Chapter Five provides detailed rules for imposing imprisonment, probation, fines, restitution, and supervised release. It sets out the sentencing table of applicable guideline imprisonment ranges and the Commission’s policy statements governing departures from the range.

The sentencing table. The sentencing table in Part A is a grid of sentencing ranges produced by the inter-

14. The guidelines, however, “do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law.” §4A1.2, comment. (n.6).

section of offense levels and criminal history categories. Most ranges are expressed in months, although some allow for, or even require, life imprisonment. The sentencing table's grid is divided into four "zones," A through D. If a defendant's sentencing range is in Zone A, a guideline sentence of straight probation is available (all the ranges in Zone A are 0 to 6 months). §5B1.1(a)(1), §5C1.1(b). In Zone B or C, the guidelines allow for a "split" sentence (probation or supervised release conditioned upon some confinement). §5B1.1(a)(2), §5C1.1(c) §5C1.1(d). For ranges in Zone D, a within-guideline sentence requires imprisonment. §5C1.1(f).

Guideline §5G1.1 explains the interplay between the guideline ranges in the sentencing table and the penalty ranges set by statute. It allows sentence to be imposed at any point within the guideline range, so long as the sentence is not outside statutory limits. *See* §5G1.1(c). When the entire range is above the statutory maximum, the maximum becomes the guideline sentence. §5G1.1(a). Similarly, the statutory minimum becomes the guideline sentence if it is greater than any sentence in the guideline range. §5G1.1(b). Guidelines §5G1.2 and §5G1.3 set out rules for sentencing a defendant who is convicted on multiple counts or who is subject to an undischarged prison term. In certain circumstances, these rules can call for partially or fully consecutive sentences.

Departures. Together, Parts H and K set out the Commission's policies on the factors that may be considered in departing from, or fixing a sentence within, the guideline range. Before *Booker* excised § 3553(b)(1) from the Sentencing Reform Act, these parts strictly limited the district court's authority to sentence outside the guideline range; non-guideline sentences were available only when a case presented an aggravating or mitigating circumstance "of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." §5K2.0(a), p.s. Now, with the exception of special government-sponsored downward departures, more courts sentence outside the guideline range based on § 3553(a) factors than on the departure grounds listed in Chapter Five.¹⁵

15. *See Final Report* 62, tbl. 1 (excepting government-sponsored downward departures, courts sentenced outside the range in 2,276 cases based on departure grounds, and in 6,947 cases based on the factors in § 3553(a)).

Nevertheless, in an individual case, the Commission's policy statements on departure can have a profound effect on the likelihood of a sentence outside the range.

Part H states the Commission's policy that certain offender characteristics, including age, education and vocational skills, employment record, family ties and responsibilities, and community ties, are "not ordinarily relevant" in determining the propriety of a departure. U.S.S.G. Ch.5, Pt.H, intro. comment. The operative word is "ordinarily"—in exceptional cases, one or more of those characteristics may support a departure. Even in the ordinary case, those characteristics may be relevant for courts deciding where to sentence within the guideline range, or whether to impose a sentence outside the range under *Booker* and § 3553(a).¹⁶

Certain characteristics listed in Part H can never support a departure, including role in the offense (§5H1.7, p.s.), drug or alcohol dependence and gambling addiction (§5H1.4, p.s.), and lack of guidance as a youth (§5H1.12, p.s.). While family and community ties are usually a potential departure ground in extraordinary cases, they can never be a basis for downward departure in a child or sex offense. §5H1.6, p.s. In accordance with congressional directive, policy statement §5H1.10 provides that certain characteristics are never relevant to the determination of the sentence: race, sex, national origin, creed, religion, and socioeconomic status. *See* 28 U.S.C. § 994(d). There is disagreement among the courts whether, after *Booker*, characteristics limited or prohibited from consideration by the *Guidelines Manual* are nevertheless relevant to sentencing under § 3553(a).¹⁷

Part K authorizes a downward departure on the government's motion if the defendant "has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." §5K1.1, p.s.; *cf.* 18 U.S.C. §§ 3553(b)(2)(A)(iii),

16. *See Final Report* 82–83, tbls. 8–9 (courts, using authority granted by *Booker*, have cited factors discouraged by Part 5H at least 1,158 times when sentencing below guideline range).

17. *See United States v. Long*, 425 F.3d 482, 488 (7th Cir. 2005) (after *Booker*, district court is free to consider factors outlined in § 3553(a), "including those that were specifically prohibited by the guidelines . . ."); *United States v. Phelps*, 366 F. Supp. 2d 580, 590–91 (E.D. Tenn. 2005) (noting district courts' disagreement on issue); *see, e.g., Final Report* 82–83, tbls. 8–9 (prohibited factor of drug or alcohol dependency cited 72 times in sentencing below guideline range).

3553(e). (Cooperation is discussed below, under “Plea Bargaining and the Guidelines.”)

For a departure on a ground other than cooperation, policy statement §5K2.0 states general principles, and provides special rules for downward departures in child and sex offenses. Generally, a departure may be warranted when a case presents a circumstance that the Commission has identified as a potential departure ground; it may also be warranted in an “exceptional” case, based on a circumstance the Commission has not identified, on one it considers “not ordinarily relevant” under Part H, or on one that, although taken into account in determining the guideline range, is present in an exceptionally great (or small) degree. §5K2.0(a)(2), (3), (4). A circumstance that would not alone make a case “exceptional” may do so in combination with other circumstances, and thus justify a departure, but only if each circumstance is identified in the *Guidelines Manual* as a permissible departure ground. §5K2.0(c).

Like Part H, the policy statements of Part 5K prohibit certain circumstances as departure grounds, including a defendant’s financial difficulties and post-offense rehabilitative efforts. §5K2.0(d), §5K2.12, §5K2.19. Other circumstances are identified as potential grounds for departure, usually upward. Six listed circumstances may support a downward departure, however: (1) victim’s wrongful provocation, (2) commission of a crime to avoid a perceived greater harm, (3) coercion and duress, (4) diminished capacity, (5) voluntary disclosure of the offense, and (6) aberrant behavior. For child and sex offenses, the grounds supporting downward departure are far more limited. *See* §5K2.0(b), §5K2.22, p.s.

In certain districts, policy statement §5K3.1 allows departures of up to 4 levels, pursuant to a government-authorized early-disposition program. §5K3.1, p.s. (Such “fast-track” programs are discussed below, under “Plea Bargaining and the Guidelines.”)

Chapter Six: Sentencing Procedures and Plea Agreements. Chapter Six sets out policy statements for preparing and disclosing the presentence report, resolving disputed sentencing issues, and considering plea agreements and stipulations. These policy statements were promulgated on the premise that sentencing judges were authorized to make findings that increased mandatory guideline sentences. That premise was rejected, on constitutional grounds, by *Booker*. And

while the guidelines are now advisory, their importance to the sentencing decision have led some courts to continue to question the validity of the sentencing procedures Chapter Six establishes.¹⁸

Chapter Six, like the Sentencing Reform Act and the rules of evidence, places no limitation on the kinds of information to be used in resolving sentencing disputes. The court may consider any information that “has sufficient indicia of reliability to support its probable accuracy.” U.S.S.G. §6A1.3(a), p.s.; *cf.* 18 U.S.C. § 3661 (declaring “[n]o limitation” on the information about the defendant that may be considered by the sentencing court); FED. R. EVID. 1101(d)(3) (rules of evidence inapplicable to sentencing). While “[w]ritten statements of counsel or affidavits of witnesses” may often provide an adequate basis for sentencing findings, “[a]n evidentiary hearing may sometimes be the only reliable way to resolve disputed issues.” §6A1.3, p.s., comment. para. 2.

The Commission suggests that the standard of proof for sentencing factors is a preponderance of the evidence. §6A1.3, p.s., comment. para. 4. After *Booker*, a number of sentencing courts have disagreed, requiring that guideline sentencing factors be proved beyond a reasonable doubt.¹⁹ Particular guidelines may also require a higher standard of proof in specific contexts. *See, e.g.*, U.S.S.G. §3A1.1(a) (to increase offense level for hate-crime motivation, court must find supporting facts beyond a reasonable doubt).

18. *See, e.g., United States v. Malouf*, 377 F. Supp. 2d 315 (D. Mass. 2005); *United States v. Lozano*, No. 8:03CR481, 2005 WL 3019488 (D. Neb. Nov. 10, 2005); *United States v. Gray*, 362 F. Supp. 2d 714 (S.D.W.Va. 2005). *But see Final Report* 21–22 & nn. 152–55 (noting circuits’ rejections of constitutional post-*Booker* challenges to guideline fact-resolution procedures).

19. *See, e.g., United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1027–28 (D. Neb. 2005); *United States v. Pimental*, 367 F. Supp. 2d 143, 153–54 (D. Mass. 2005). Even before *Booker*, some courts had called for a higher proof burden in specific contexts. *See, e.g., United States v. Kikumura*, 918 F.2d 1084, 1103 (3d Cir. 1990) (when court “departs upwards dramatically,” requiring proof by clear and convincing evidence and prohibiting use of hearsay statements “unless other evidence indicates that they are reasonably trustworthy”); *United States v. Jordan*, 256 F.3d 922, 927–30 (9th Cir. 2001) (applying six-factor test to determine whether guideline application has “disproportionate effect” that requires application of clear and convincing evidence standard).

If the court intends to depart from the guideline range on a ground not identified in the presentence report or a pre-hearing submission, Chapter Six requires that it provide reasonable notice that it is contemplating such a ruling, specifically identifying the grounds for the departure. U.S.S.G. §6A1.4, p.s.; *see also* FED. R. CRIM. P. 32(h) (same). It is not yet clear what notice is necessary before the court, acting under § 3353(a) and *Booker*, may sentence outside the guideline range other than by departure. *See* FED. R. CRIM. P. 32(i)(1)(C) (court must allow the parties' attorneys to comment on "matters relating to an appropriate sentence"); FED. R. CRIM. P. 32(h) (Proposed Draft August 2005) (expanding notice requirement to include grounds for both departures and other non-guideline sentences); *see generally Burns v. United States*, 501 U.S. 129, 138–39 (1991) (considering notice required by Rule 32).

Chapter Six, Part B sets out the *Guidelines Manual's* procedures and standards for accepting plea agreements. The standards vary with the type of agreement. *See* FED. R. CRIM. P. 11(c)(1). (Plea agreements are discussed below, under "Plea Bargaining and the Guidelines.") While the parties may stipulate to facts as part of a plea agreement, policy statement §6B1.4(d) provides that such a stipulation is not binding on the court. Before entry of a dispositive plea, prosecutors are encouraged, but not required, to disclose to the defendant "the facts and circumstances of the offense and offender characteristics, then known to the prosecuting attorney, that are relevant to the application of the sentencing guidelines." §6B1.2, p.s., comment. para. 5.

Chapter Seven: Violations of Probation and Supervised Release. Chapter Seven sets out policy statements applicable to revocation of probation and supervised release. *See* 18 U.S.C. § 3553(a)(4)(B) (requiring court to consider guidelines and policy statements applicable to revocation). The policy statements classify violations of conditions, guide probation officers in reporting those violations to the court, and propose dispositions for them. For violations leading to revocation, policy statement §7B1.4 provides an imprisonment table similar in format to the sentencing table.

Chapter Eight: Sentencing of Organizations. When a convicted defendant is an organization rather than an individual, application of the guidelines is governed by Chapter Eight.

Appendices. The official *Guidelines Manual* includes three appendices. Appendix A is an index

specifying the offense conduct guideline or guidelines that apply to a conviction under a particular statute. Appendix B sets forth selected sentencing statutes. The two-volume Appendix C comprises the amendments to the *Guidelines Manual* since its initial publication in 1987.

Applying the Guidelines

For years, the application of the guidelines has been the paramount issue in federal sentencing, because of the mandatory range that the guidelines set and the limited authority to sentence outside that range. After *Booker*, guideline application remains important, but the guideline range is just one of seven statutory factors to be considered in imposing a sentence. 18 U.S.C. § 3553(a). Thus, in addition to calculating the defendant's guideline range, counsel must also consider the remaining factors under § 3553(a), and determine their relative weight in the defendant's case. Only then can a reasoned argument be constructed for the appropriate sentence.

Step-by-Step Guideline Application. Step-by-step instructions for using the guidelines are prescribed in guideline §1B1.1. To facilitate following those steps, the Sentencing Commission has prepared sentencing worksheets. The worksheets were prepared before *Booker*, and they treat the guidelines as mandatory rather than advisory. Nevertheless, they may assist newcomers to the guidelines. The worksheets for individuals are appended to this paper, and the following description is keyed to them.

- Prepare a separate Worksheet A (Offense Level) for each count of conviction. Determine the applicable guideline by reference to guideline §1B1.2 and Appendix A—Statutory Index. A conviction for conspiracy to commit more than one offense is treated as if the defendant were convicted on a separate conspiracy count for each offense. §1B1.2(d). If the defendant has entered into a plea agreement stipulating to having committed an additional offense, the stipulated offense must be treated as an additional count of conviction. §1B1.2(c).
- From the offense conduct guideline in Chapter Two, determine the base offense level and any applicable specific offense characteristics. Offense conduct is usually determined by reference to the relevant-conduct guideline, which frequently includes conduct from uncharged offenses, dismissed counts, and even acquitted

counts. *See* §1B1.3, comment. (backg'd). Do not overlook any cross-reference to another offense guideline.

- Make all applicable adjustments from Chapter Three, Parts A, B, and C: victim-related adjustments, role in the offense, and obstruction. Unless otherwise specified, these adjustments are based upon all relevant conduct as defined in guideline §1B1.3(a).
- If more than one count is being scored, use Worksheet B to apply Chapter Three, Part D (Multiple Counts), to group the counts and adjust the offense level upward if required.
- Consider the anticipated adjustment, if any, for acceptance of responsibility under Chapter Three, Part E.
- Referring to Chapter Four, Part A, use Worksheet C to determine the criminal history category. Analyze prior convictions for any issues of staleness, exclusion, relatedness, or invalidity.
- Proceeding to Worksheet D, check carefully whether the terrorism guideline §3A1.4, the career offender guideline, §4B1.1, or the criminal livelihood guideline, §4B1.3, applies. In an armed career criminal case, apply guideline §4B1.4. In a case of sex offense against a minor, check whether guideline §4B1.5 applies. Remember that these guidelines can dramatically increase the applicable range.
- Using the total offense level and the criminal history category, determine the applicable guideline range from the sentencing table, Chapter Five, Part A. From this range, determine all applicable sentencing requirements and options from Chapter Five, Parts B through G. For each count of conviction, consider whether the statutory maximum or minimum sentence affects the guideline range. §5G1.1. In a drug case, consider whether the defendant qualifies for relief from a statutory minimum under the “safety valve.” *See* §5C1.2. If the defendant faces multiple counts, or is subject to an undischarged term of imprisonment, consider the effect of §5G1.2 and §5G1.3.
- Consider any possible grounds for departure, upward or downward. Take note of any specific suggestions for departure contained in commentary to the offense conduct guidelines in Chapter Two. Review the total criminal history—not just countable convictions—for possible departure in light of policy statement §4A1.3, Adequacy of Criminal History Category. Study the policy statements in Chapter Five, Part H (Specific

Offender Characteristics); and in Chapter Five, Part K (Departures). Keep in mind that, except in child and sex offenses, *see* §5K2.0(b), p.s., departure grounds are not limited to those discussed by the Commission, and identified grounds not justifying departure individually may combine to support a departure in a particular case, *see* §5K2.0(a)(2)(B), p.s.; §5K2.0(c), p.s. Even with advisory guidelines, a major part of sentencing advocacy on behalf of the defendant can be resisting an upward departure or seeking a downward departure.

Sentencing Hearing. Before the sentencing hearing, counsel should consider filing a sentencing memorandum, especially when presenting novel or complex issues. If the defendant is requesting a sentence below the guideline range, the memorandum should provide a ready foundation for the court’s statement of reasons in adopting it. *See* 18 U.S.C. § 3553(c).

Preparing for the sentencing hearing requires familiarity with the procedures for disclosing the presentence report and objecting to it, and for resolving disputes both before and during the hearing. These procedures are set out in Federal Rule of Criminal Procedure 32 and Chapter Six, Part A of the *Guidelines Manual*, and they may also be governed by local court rules or practices. In preparing for the hearing, counsel should consider whether to argue for more formal sentencing procedures in light of the constitutional concerns raised by *Booker*.²⁰ At the hearing itself, counsel must scrupulously observe traditional rules on preservation of error to protect issues for possible appeal under § 3742.

Plea Bargaining and the Guidelines

Federal Rule of Criminal Procedure 11(c)(1) and policy statement §6B1.2 describe three forms of plea agreement: charge bargain, sentence recommendation, and specific, agreed sentence. While other forms of plea agreement are possible, these are the most common. Each has important consequences for sentencing under the advisory guidelines. A charge bargain must be carefully analyzed to determine whether its supposed guideline benefit is real or illusory, once the effect of relevant conduct and multiple-count grouping have

20. For possible suggestions on enhancing the fairness of the sentencing hearing, see Alan Dubois and Anne E. Blanchard, *The Due Process Approach to Sentencing Justice: How Courts Can Use Their Discretion to Make Sentencings More Accurate and Trustworthy*, 18 FED. SENT’G REP. 84 (Dec. 2005).

been considered. Other, equally important considerations affect the possible benefits of sentence-recommendation and sentence-agreement bargains. In all cases, the potential value of an acceptance-of-responsibility adjustment must be carefully considered. And because cooperation by the defendant is a common element of plea bargains, the statutory and guideline provisions that affect cooperating defendants can be of central importance. Each of these subjects is discussed below.

Charge Bargaining. Policy statement §6B1.2(a) authorizes the court to accept a defendant’s plea to one or more charges under Rule 11(c)(1)(A), in exchange for the dismissal of others, if “the remaining charges adequately reflect the seriousness of the actual offense behavior” and “accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines.” Federal plea bargaining has typically involved this form of agreement, under which a defendant has the right to withdraw his plea to the bargained charges if the other charges are not dismissed. Charge bargains, however, will often have little effect on the guideline range. This is because of the dramatic impact of two related guideline concepts: relevant conduct and multiple-count grouping.

Relevant conduct. The common plea agreement calling for dismissal of counts will not reduce the offense level if the subject matter of the dismissed counts is “relevant conduct” for purposes of determining the guideline range. See U.S.S.G. §1B1.3. For example, a defendant charged with multiple counts of distributing controlled substances who pleads guilty to only one count will usually have a base offense level determined from the total amount of drugs involved in all counts.

Despite the effect of relevant conduct, however, charge bargaining can confer important benefits at sentencing. When one of the counts is governed by a Chapter Two guideline with a lower offense level, a plea to that count may produce a lower guideline range.²¹ Even if a count does not have a lower guideline range, it may carry a lower statutory maximum. Because statutes “trump” guidelines, a given count may cap the maximum sentence below the probable guideline range for the

case, *see* §5G1.1(a), or avoid a statutory minimum that would raise a sentence above the otherwise-applicable guideline range, *see* §5G1.1(b). Even when the estimated guideline range falls within the statutory sentencing range, a charge bargain to a count with a lower statutory maximum can limit a possible sentence above the guideline range, imposed either as an upward departure under Chapter Five of the *Guidelines Manual*, or as a non-guideline sentence based on the sentencing factors in 18 U.S.C. § 3553(a).

Multiple-count grouping. A corollary to the relevant-conduct rule, guideline §3D1.2 requires grouping of counts in many common prosecutions in which separate charges involve substantially the same harm. When counts are grouped, a single offense level—the highest of the counts in the group—applies to those counts of conviction. §3D1.3(a). In such cases, the offense level will not be adjusted upward even if a defendant is convicted of multiple counts. In the case of offenses, such as robberies, that the guidelines do not group, Chapter Three, Part D may require an upward adjustment for multiple convictions. Dismissing counts will avoid this adjustment, provided the defendant does not stipulate to all the elements of the dismissed offenses as part of a plea bargain. Regardless of the grouping rules, some statutes (most notably 18 U.S.C. § 924(c) require a consecutive sentence.

Sentencing Recommendation; Specific Sentencing Agreement. In addition to charge bargains, Federal Rule of Criminal Procedure 11 authorizes the prosecutor to make nonbinding recommendations, and binding agreements, with regard to the sentence to be imposed. Rule 11(c)(1)(B) authorizes the prosecutor to recommend, or agree not to oppose, a particular sentence or sentencing range, or the application of a particular guideline or policy statement. Sentence recommendations under Rule 11(c)(1)(B) are non-binding: A defendant who agrees to such a recommendation must understand that if the court rejects it, he is not entitled to withdraw his plea. FED. R. CRIM. P. 11(c)(3)(B). Rule 11(c)(1)(C) authorizes a plea agreement that requires imposition of a specific sentence, a sentence within an agreed guideline range, or the application of a particular guideline or policy statement. Unlike sentence-recommendation agreements, Rule 11(c)(1)(C) agreements are binding: If the court rejects the proposed sentence, the defendant is entitled to withdraw the plea. Policy statement §6B1.2(b) provides that a court may accept a Rule 11(c)(1)(B) or 11(c)(1)(C)

21. Note, however, that dismissed charges not considered in determining the guideline range can provide grounds for upward departure. §5K2.21, p.s.

agreement only if the proposed sentence is within the applicable guideline range or departs from the range for justifiable reasons. Because the policy statement was promulgated before *Booker* was decided, it does not address the question whether a recommended sentence can, or must, be justified under 18 U.S.C. § 3553(a).

Because of the rigid limits it places on sentencing discretion, a binding sentence agreement under Rule 11(c)(1)(C) is often difficult to obtain. If the prosecutor will not agree to a specific sentence, or if court rejection is feared, counsel should consider the less-restrictive forms authorized by the rule, which can still afford the defendant a measure of protection. For example, the parties might agree under Rule 11(c)(1)(C) that a particular adjustment apply, that the court not depart, or that the sentence not exceed a certain guideline range. If the court does not follow the parties' agreement on a particular sentence component, the defendant can withdraw the plea.

Acceptance of Responsibility. Sometimes, the only perceived guideline-range benefit for a plea of guilty will be the adjustment for acceptance of responsibility. Pleading guilty does not ensure the adjustment, but it provides a basis for it. Demanding trial does not automatically preclude the adjustment, but usually renders it a remote possibility. The court's determination of acceptance of responsibility "is entitled to great deference on review." U.S.S.G. §3E1.1, comment. (n.5). Commentary explains that the adjustment for acceptance of responsibility is to be determined by reference to the offense of conviction; the defendant need not admit relevant conduct.²² Nevertheless, while "[a] defendant may remain silent" about relevant conduct, "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." *Id.* (n.1(a)).

In evaluating the prospects for an acceptance-of-responsibility adjustment, counsel must guard against giving up a valuable right to trial, solely in pursuit of an

adjustment that may already be lost. Scrutinize all pertinent facts that may bear upon this determination, paying special attention to the possibility of an adjustment for obstruction of justice under guideline §3C1.1. *See* U.S.S.G. §3E1.1, comment. (n.4). When it is certain that a defendant will not receive the adjustment for acceptance of responsibility even upon a plea of guilty, and the plea confers no other benefit, then the plea will not improve the guideline range. Even so, a guilty plea may benefit the defendant—by diminishing the risk of an upward departure, improving the possibility or extent of a downward departure, or inducing the court to impose a lower sentence based on the factors in 18 U.S.C. § 3553(a).

Even when the acceptance adjustment is not in doubt, counsel should consider whether plea bargaining could help obtain a government motion for a third level of reduction under §3E1.1(b), as required by the 2003 PROTECT Act. Note, however, that the plain language of the amended guideline does not require entry into a plea agreement, but only "timely notifi[cation]" of an "intention to enter a plea of guilty." *Id.*

Cooperation. Congress directed the Commission to ensure that the guidelines reflect the general appropriateness of imposing a lower sentence "to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 28 U.S.C. § 994(n).²³ The Commission responded to this directive by promulgating policy statement §5K1.1. The policy statement requires a motion by the government before the court can depart for substantial assistance. *See Wade v. United States*, 504 U.S. 181, 185 (1992) (dictum) (government §5K1.1 motion is "the condition limiting the court's authority" to reduce sentence); *cf.* 18 U.S.C. § 3553(e) (government motion required for substantial-assistance departure below statutory minimum).

When the court considers a cooperation motion, it should give "[s]ubstantial weight" to "the government's evaluation of the extent of the defendant's assistance"; however, the ultimate determination of the value of the defendant's assistance is for the court to make. §5K1.1(a)(1), p.s. & comment. (n.3). Even without a government departure motion, cooperation can benefit the defendant at sentencing. The court can consider it in

22. In contrast, the "safety valve" specifically requires that, before a defendant can be sentenced below a statutory minimum, he must provide the government with all information and evidence concerning not only the offense, but also "offenses that were part of the same course of conduct or of a common scheme or plan." 18 U.S.C. § 3553(f)(5); *see also* U.S.S.G. §5C1.2(a)(5) (same).

23. For cooperation departures in child and sex offenses, *see also* 18 U.S.C. § 3553(b)(2)(A)(iii).

placing the sentence within the guideline range, in determining the extent of a departure based on other grounds, or as one of the factors justifying a lower sentence under § 3553(a).²⁴ By contrast, “[a] defendant’s refusal to assist authorities . . . may not be considered as an aggravating sentencing factor.” §5K1.2, p.s.

A defendant contemplating cooperation should always seek the protection of Federal Rule of Evidence 410 and guideline §1B1.8. With limited exceptions, Rule 410 renders inadmissible, in any civil or criminal proceeding, any statement made in the course of plea discussions with an attorney for the government, even if the discussions do not ultimately result in a guilty plea.²⁵ See also FED. R. CRIM. P. 11(f). Guideline §1B1.8 permits the parties to agree that information provided by a cooperating defendant will not be used to increase the applicable guideline range.

Guideline §1B1.8 has limited effect. It does not protect against the use of information previously known to the government or relating to criminal history, and it does not apply if the defendant breaches the cooperation agreement or is prosecuted for perjury or false statement. Moreover, §1B1.8 protects the defendant only from an increase in the guideline range, not from a higher sentence within that range, an upward departure, or a higher sentence under § 3553(a). While it is the “policy of the Commission” that information provided under a §1B1.8 agreement “shall not be used” for an upward departure, §1B1.8, comment. (n.1), counsel should seek an agreement that expressly precludes using the information as a basis for any increase in sentence.

“Fast-track” dispositions. For a number of years, prosecutors in some high-volume federal districts in the southwest have offered special “fast-track” disposition programs in common immigration and drug cases. These programs can offer favorable charge bargains or

sentencing dispositions in exchange for an early guilty plea. In the 2003 PROTECT Act, Congress approved fast-track programs allowing up to a 4-level downward departure from the guideline range. See Pub. L. No. 108-21, § 401(m)(2)(B); see also U.S.S.G. §5K3.1, p.s. Such programs are currently available in 16 federal districts.²⁶

A Department of Justice memorandum sets out the required criteria for such programs, which must be approved by both the Attorney General and the local U.S. Attorney. See Attorney General Memorandum Entitled “Department Principles for Implementing an Expedited Disposition or ‘Fast-Track’ Prosecution Program in a District” (July 28, 2003), available at <http://txw.fd.org/pdf/lib/memoagft.pdf>. At a minimum, a fast-track program must require that the defendant agree to the factual basis and waive the rights to file pretrial motions, to appeal, and to seek collateral relief (except for ineffective assistance). *Id.* at 2–3. (Waivers are further discussed below, under “Some Traps for the Unwary.”)

If an applicable fast-track program is in place in a court, counsel should consider whether it would benefit the defendant to participate, in light of the important rights that the program may require the defendant to relinquish.

Some Traps for the Unwary

The Weight of the Guidelines After *Booker*. As explained above, *Booker* rendered the guidelines advisory, making them one factor among many to be considered in sentencing under 18 U.S.C. § 3553(a). Since *Booker*, however, district courts have debated how much weight to give the guidelines in sentencing decisions. Some courts give them heavy weight, reasoning that the Sentencing Commission considered many of the § 3553(a) factors in promulgating them, and that adherence to the guidelines avoids unwarranted disparity.²⁷ Other courts disagree, pointing out that the guidelines fail to account for, or expressly ignore, important

24. See *United States v. Fernandez*, No. 05-1596-CR, 2006 WL 851670, at *11–*12 (2d Cir. Apr. 3, 2006) (even without government motion, cooperation is relevant consideration under § 3553(a)(1)); see also *Final Report* 112–15 (discussing cooperation-based reductions in absence of government motion).

25. A defendant may waive the protections of Rule 410 as part of a plea agreement. *United States v. Mezzanatto*, 513 U.S. 196 (1995).

26. See *Final Report* app. E-18 (identifying districts with fast-track programs).

27. See, e.g., *United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005); *United States v. Wanning*, 354 F. Supp. 2d 1056 (D. Neb. 2005); *United States v. Peach*, 356 F. Supp. 2d 1018 (D.N.D. 2005).

statutory § 3553(a) factors.²⁸ This debate is mirrored in the appellate courts, which are divided on whether to afford a presumption of reasonableness in reviewing sentences within the guideline range.²⁹

Defense counsel should beware of adopting any uniform position on these issues. In many cases, the guidelines are artificially high, placing too much emphasis on the aggravating circumstances of the offense or the defendant's previous criminal history. In such cases, defense counsel should be prepared to oppose giving any weight to the sentence called for by guidelines, since, in light of all the sentencing factors under § 3553(a), that sentence would be greater than necessary to achieve the purposes of sentencing. Alternatively, if the court insists on giving the guidelines heavy weight, counsel should consider arguing for heightened standards of proof, or even jury findings, which *Booker* found constitutionally necessary when guidelines control the sentencing decision. In other cases, the guideline range may call for a sentence lower than the court would otherwise be inclined to impose. In those cases, defense counsel can suggest deference to the Sentencing Commission's consideration of the § 3553(a) factors, and argue that the Commission's recommended sentence is sufficient to achieve the purposes of sentencing.

This flexible, case-by-case approach may appear to be inconsistent—it is not. As a number of courts have recognized, a case-by-case approach is necessary to account for the fact that the guidelines sometimes, but not always, get the balance of § 3553(a) factors right.³⁰ When the guidelines call for an appropriate sentence, counsel can acquiesce in, or even argue for, a sentence

within the range. But when the guidelines get the factors wrong, and threaten to harm the defendant as a result, it is counsel's duty to oppose their automatic application.

Pretrial Services Interview. In most courts, a pretrial services officer (or a probation officer designated to perform pretrial services) will seek to interview arrested persons before their initial appearance, to gather information pertinent to the release decision. Absent specified exceptions, information obtained during this process “is not admissible on the issue of guilt in a criminal judicial proceeding.” 18 U.S.C. § 3153(c)(3). That information is, however, made available to the probation officer for use in the presentence report. § 3153(c)(2)(C).

Certain information pertinent to the release decision—including criminal history (especially juvenile adjudications and tribal court convictions that might otherwise be unavailable), earnings history, and possession of a special skill—can raise the guideline range, provide a basis for upward departure, or support a higher sentence under 18 U.S.C. § 3553(a). Such information can also affect the decision to impose a fine or restitution. Because of these many dangers, counsel should attend the interview if possible, or advise the defendant beforehand. Most importantly, counsel should take scrupulous care to ensure that the defendant knows any information provided must be truthful. A finding that the defendant gave false information can lead to denial of acceptance of responsibility, an upward adjustment for obstruction, and even the filing of additional charges. Because of these dangers, counsel who enters a case after the report is prepared must learn what information was acquired by the officer to be aware of its possible effect. *See* 18 U.S.C. § 3153(c)(1) (requiring that pretrial services report be made available to the defense).

Waiver of Sentencing Appeal. One of the most important safeguards put in place by the Sentencing Reform Act was the right to appellate review. *See* 18 U.S.C. § 3742. And while *Booker* substantially changed guideline sentencing procedure, it specifically retained the right of appellate review. 543 U.S. at 260.

In many districts, prosecutors attempt to insulate sentences from review by requiring the defendant to waive the right to appeal the sentence as part of a plea agreement. The Supreme Court has never approved these appeal waivers, and a number of district judges

28. *See, e.g., United States v. Ranum*, 353 F. Supp. 2d 984 (E.D. Wis. 2005); *United States v. Myers*, 353 F. Supp. 2d 1026 (S.D. Iowa 2005); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019 (D. Neb. 2005); *see generally United States v. Pacheco-Soto*, 368 F. Supp. 2d 1198 (D.N.M. 2005) (collecting cases).

29. *Compare, e.g., United States v. Mykytiuk*, 415 F.3d 606, 607 (7th Cir. 2005) (adopting presumption of reasonableness), with *United States v. Crosby*, 397 F.3d 103, 115 (2d Cir. 2005) (declining to adopt presumption of reasonableness). *See generally Final Report* 35 (collecting cases).

30. *See, e.g., Crosby*, 397 F.3d at 113 (weight to be given guidelines depends on context); *United States v. Pacheco-Soto*, 368 F. Supp. 2d at 1202 (citing *Crosby* for the proposition that “[i]t is not useful to determine in advance the weight that sentencing judges should give to applicable Guideline ranges”); *United States v. Jaber*, 362 F. Supp. 2d 365, 371 (D. Mass. 2005) (agreeing with approach in *Crosby*).

have refused to accept them as part of a plea bargain.³¹ However, they have been approved (with some limitations) by every court of appeals that has considered them,³² even after *Booker*.³³ Federal Rule of Criminal Procedure 11(b)(1)(N) requires the district court to advise the defendant of the terms of any bargained sentencing-appeal waiver as part of the plea colloquy.

Unthinking acceptance of an appeal waiver can have disastrous results for the client. The waiver is usually accepted before the presentence report is prepared; at that time, the defendant cannot know what possible errors the probation officer, or the court, will make in determining the guideline range, the propriety of a departure, or the effect of the other sentencing factors applicable under § 3553(a). Counsel can defend against the danger of an unknowing waiver by refusing to agree to one, or by demanding concessions in exchange for it (e.g., a reduced charge, or an agreement to a binding sentence or guideline range). If the prosecutor insists on the waiver, and refuses to give valuable concessions in

exchange for it, defense counsel should carefully consider with the defendant whether to plead guilty without an agreement, or go to trial. Counsel should also resist any proposed waiver that does not except appeals or collateral attacks based on ineffective assistance or prosecutorial misconduct; without these exceptions, the waiver presents the serious ethical problem of lawyers bargaining to protect themselves from possible future liability.³⁴

Presentence Investigation Report and Probation Officer's Interview. In most cases, a probation officer will provide a presentence investigation report to the court before imposition of sentence. 18 U.S.C. § 3552(a); FED. R. CRIM. P. 32(c). The importance of the report cannot be overstated. In it, the probation officer will recommend fact findings, guideline calculations, and potential grounds for departure; in many districts, the officer may also recommend factors to be considered in sentencing outside the guideline range under 18 U.S.C. § 3553(a). After sentencing, the report is sent to the Federal Bureau of Prisons, where it can affect the placement decision, conditions of confinement, and the defendant's eligibility for prison programs. The report can also affect the conditions of probation or supervised release. Finally, the report must be disclosed not only to the Sentencing Commission, but also to Congress upon request. 28 U.S.C. § 994(w).

Many presentence report recommendations, while nominally objective, have a significant subjective component. The probation officer's attitude toward the case or the client may substantially influence the sentence recommendations, which enjoy considerable deference from both the judge at sentencing and the reviewing court on appeal. For these reasons, the effective advocate will independently review all elements of the case to make any necessary objections to the probation officer's report and affirmatively present the defense argument for a favorable sentence. Counsel should never assume that the probation officer has arrived at a favorable recommendation, or even a correct one.

The probation officer's presentence investigation will usually include an interview with the defendant. Broader than the interview conducted by pretrial services, this interview has even greater potential to increase a sentence in specific, foreseeable ways. Dis-

31. See, e.g., *United States v. Johnson*, 992 F. Supp. 437 (D.D.C. 1997) (refusing to accept plea bargain containing appeal waiver provision); *United States v. Raynor*, 989 F. Supp. 43 (D.D.C. 1997) (same); see also *United States v. Melancon*, 972 F.2d 566, 570–80 (5th Cir. 1992) (Parker, J., concurring) (expressing serious misgivings about legality and wisdom of appeal waivers).

32. See, e.g., *United States v. Story*, 439 F.3d 226, 231 (5th Cir. 2006) (waiver not effective unless government seeks to enforce it); *United States v. Khattak*, 273 F.3d 557, 563 (3d Cir. 2001) (appeal waiver not binding when sentencing error would work a miscarriage of justice); *United States v. Teeter*, 257 F.3d 14, 25–26 (1st Cir. 2001) (same); *United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000) (appeal waiver does not bar appeal if sentence exceeded maximum authorized penalty or was based on constitutionally impermissible factor); *United States v. Black*, 201 F.3d 1296, 1301 (10th Cir. 2000) (appeal waivers, like other contracts, subject to public policy constraints); *United States v. Goodman*, 165 F.3d 169, 175 (2d Cir. 1999) (refusing to enforce a broad waiver that would expose the defendant to “a virtually unbounded risk of error or abuse by the sentencing court”); *United States v. Jacobson*, 15 F.3d 19, 23 (2d Cir. 1994) (waiver not binding if sentence imposed on basis of ethnic bias); *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992) (waiver cannot subject defendant to sentencing at whim of district court); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990) (waiver does not prevent appeal if sentence imposed is not in accordance with negotiated agreement).

33. See *United States v. Simpson*, 430 F.3d 1177, 1192 (D.C. Cir. 2005) (Silberman, J., concurring) (although premitting the question, collecting cases upholding validity of appeal waivers post *Booker*).

34. See Ohio Advisory Ethics Op. 2001-6 (2001); Tennessee Advisory Ethics Op. 94-A-549 (1994); North Carolina Ethics Op. 129 (1993).

closing undetected relevant conduct may, by operation of guideline §1B1.3, increase the offense level. Information first revealed during the presentence interview may affect Chapter Three adjustments, such as obstruction of justice and acceptance of responsibility. Revelations of undiscovered criminal history may increase the criminal history score or provide a ground for departure. Other revelations, such as drug use and criminal associations, may result in an unfavorable adjustment or upward departure, or otherwise support a sentence above the guideline range.

Because the presentence interview holds many perils, the defendant must fully understand its function and importance, and defense counsel should attend the interview. *See* FED. R. CRIM. P. 32(c)(2) (requiring that probation officer give counsel notice and reasonable opportunity to attend interview). In some cases, counsel may decide to limit the scope of the presentence interview. While the privilege against self-incrimination applies at sentencing, *Mitchell v. United States*, 526 U.S. 314 (1999), refusal to submit to an unrestricted presentence interview is often hazardous. It can jeopardize the adjustment for acceptance of responsibility or adversely affect decisions whether to follow the guidelines, or where to place the sentence within the guideline range. There is no fixed solution to this dilemma; counsel must make an informed decision as to the best course in the context of the particular case.

Guideline Amendments. Title 28 U.S.C. § 994(p) authorizes the Sentencing Commission to submit guideline amendments to Congress by May 1 of each year. Absent congressional modification or disapproval, the amendments ordinarily take effect November 1. Congress can also amend guidelines itself or direct the Commission to promulgate amendments outside the regular amendment cycle. Since the guidelines were first promulgated in 1987, they have been amended 681 times; many of these amendments changed multiple guideline provisions. All the amendments, along with explanatory notes, are reprinted in chronological order in Appendix C to the *Guidelines Manual*.

Normally, the controlling guidelines are those in effect on the date of sentencing. U.S.S.G. §1B1.11(a).³⁵ But

35. In the case of a resentencing on remand after appeal, however, the sentencing range is determined by application of the guidelines in effect on the date of the previous sentencing. 18 U.S.C. § 3742(g)(1).

if a detrimental guideline amendment takes effect between the commission of the offense and the date of sentencing, the Ex Post Facto Clause bars its application. *See United States v. Seacott*, 15 F.3d 1380, 1384 (7th Cir. 1994) (noting circuits' agreement on issue); *cf. Miller v. Florida*, 482 U.S. 423 (1987) (Clause bars retrospective application of harmful amendment to state sentencing guideline). Each guideline includes a historical note, which facilitates determining whether the guideline has been amended since the offense was committed. If ex post facto principles require use of an earlier guideline, the Commission requires that "[t]he Guidelines Manual in effect on a particular date shall be applied in its entirety." U.S.S.G. §1B1.11(b)(2).³⁶

Counsel should become familiar with each new round of submitted amendments as soon as they are published by the Commission, paying particular attention to amendments that the Commission denominates "clarifying." Clarifying amendments are intended to explain the meaning of previously promulgated guidelines, and the Ex Post Facto Clause may not bar their application to offenses committed before their effective date. If a proposed amendment is harmful, counsel should not automatically accede to its retroactive application, simply because the Commission characterized it as "clarifying." A number of courts have held that when a harmful "clarifying" amendment changes circuit precedent, it may not be retroactively applied. *See, e.g., United States v. Capers*, 61 F.3d 1100, 1110–12 (4th Cir. 1995). On the other hand, if a proposed clarifying guideline amendment benefits the client, counsel need not wait for its effective date, but can argue that the amendment provides authoritative guidance as to the meaning of the current guideline. And a beneficial amendment that is not deemed "clarifying," may never-

36. *But see* 18 U.S.C. § 3553(a)(4)(A)(i) requiring that any congressional guideline amendments in place at time of sentencing be applied "regardless of whether such amendments have yet to be incorporated" into the *Guidelines Manual*; *see also* § 3553(a)(5)(A) (same, policy statements). Note, however, that congressional guideline amendments, like any others, are subject to ex post facto prohibitions. *See, e.g., United States v. Briceno*, No. 01 CR.943 LTS, 2003 WL 22025870, at *6 n.6 (S.D.N.Y. Aug. 23, 2003) (declining to apply PROTECT Act amendment to §3E1.1 in sentencing for 2001 offense); *United States v. Lester*, 268 F. Supp. 2d 514, 515 n.2. (E.D. Pa. 2003) (government agrees that statutory and guideline amendments are inapplicable to sex offense that occurred before statute was enacted).

theless support a request for a lower sentence under § 3553.

Some amendments may benefit a defendant who is already serving an imprisonment term. If the Commission expressly provides that a beneficial amendment has retroactive effect, and the amendment would reduce the defendant's guideline range, the court may reduce the sentence. 18 U.S.C. § 3582(c)(2); U.S.S.G. §1B1.10, p.s.

Validity of Guidelines. The Sentencing Commission's guidelines, policy statements, and commentary must be consistent with all pertinent statutory provisions. 28 U.S.C. § 994(a). As *Booker* made clear, the guidelines must also conform to the requirements of the Constitution. 543 U.S. at 233–37; *see also Mistretta v. United States*, 488 U.S. 361 (1989) (considering constitutional challenges to guideline sentencing). Counsel must scrutinize all pertinent provisions for both statutory and constitutional validity, with special attention to recent amendments. *See, e.g., United States v. LaBonte*, 520 U.S. 751 (1997) (invalidating guideline amendment as contrary to congressional directive in § 994).

More About Federal Sentencing

Reference Materials

ROGER W. HAINES JR. ET AL., *Federal Sentencing Guidelines Handbook* (Thomson West 2006).

THOMAS W. HUTCHISON ET AL., *Federal Sentencing Law and Practice* (West Publishing 2006).

VERA INSTITUTE OF JUSTICE, *Federal Sentencing Reporter* (University of California Press).

Telephone Support and Online Information

The Defender Services Division Training Branch, Administrative Office of the U.S. Courts, provides a toll-free hotline for federal defender organizations and private attorneys providing defense services under the Criminal Justice Act. The number is 800-788-9908. The Sentencing Commission also offers telephone support on the guidelines, at 202-502-4545.

Defense counsel can also find a wealth of information on the Internet. Here are some valuable resources:

- United States Sentencing Commission, <http://www.ussc.gov>.
- Office of Defender Services Training Branch (Administrative Office of the U.S. Courts), <http://www.fdo.org>.
- Sentencing Law and Policy, <http://sentencing.typepad.com>.

About This Publication

Authors

Lucien B. Campbell and Henry J. Bemporad

Office of the Federal Public Defender

Western District of Texas

727 E. Durango Boulevard, B-207

San Antonio, Texas 78206-1278

Telephone: 210-472-6700 E-Mail: txw@fd.org

This publication, formerly titled *An Introduction to Federal Guideline Sentencing*, is intended to promote the continuing legal education of persons providing representational services under the Criminal Justice Act of 1964. None of the content of this paper is intended as, or should be taken as, legal advice. The views expressed are those of the authors and not necessarily those of any other federal defender. Comments or suggestions on this paper are welcome.

Worksheet A (Offense Level)

Defendant _____ District/Office _____

Docket Number (Year-Sequence-Defendant No.) _____ - _____ - _____ - _____ - _____

Count Number(s) _____ U.S. Code Title & Section _____ : _____
_____ : _____

Guidelines Manual Edition Used: 20____ (NOTE: worksheets keyed to the Manual effective November 1, 2001)

Instructions:

For each count of conviction (or stipulated offense), complete a separate Worksheet A. Exception: Use only a single Worksheet A where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)) or where a count of conspiracy, solicitation, or attempt is grouped with a substantive count that was the sole object of the conspiracy, solicitation, or attempt (see §3D1.2(a) and (b)).

1. Offense Level (See Chapter Two)

Enter the applicable base offense level and any specific offense characteristics from Chapter Two and explain the bases for these determinations. Enter the sum in the box provided.

<u>Guideline</u>	<u>Description</u>	<u>Level</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
Sum		<input type="text"/>

2. Victim-Related Adjustments (See Chapter Three, Part A)

Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

§ _____

3. Role in the Offense Adjustments (See Chapter Three, Part B)

Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

§ _____

4. Obstruction Adjustments (See Chapter Three, Part C)

Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

§ _____

5. Adjusted Offense Level

Enter the sum of Items 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Item 1.

☐

Check if the defendant is convicted of a single count. In such case, Worksheet B need not be completed.

☐

If the defendant has no criminal history, enter criminal history "I" here and on Item 4, Worksheet D. In such case, Worksheet C need not be completed.

Worksheet B

(Multiple Counts or Stipulation to Additional Offenses)

Defendant _____

Docket Number _____

Instructions

Step 1: Determine if any of the counts group. (Note: All, some, or none of the counts may group. Some of the counts may have already been grouped in the application under Worksheet A, specifically, (1) counts grouped under §3D1.2(d), or (2) a count charging conspiracy, solicitation, or attempt that is grouped with the substantive count of confiction (see §3D1.2(a)). Explain the reasons for grouping:

Step 2: Using the box(es) provided below, for each group of closely related counts, enter the highest adjusted offense level from the various "A" Worksheets (Item 5) that comprise the group (see §3D1.3). (Note: A "group" may consist of a single count that has not grouped with any other count. In those instances, the offense level for the group will be the adjusted offense level for the single count.)

Step 3: Enter the number of units to be assigned to each group (see §3D1.4) as follows:

- One unit (1) for the group of closely related counts with the highest offense level
- An additional unit (1) for each group that is equally serious or 1 to 4 levels less serious
- An additional half unit (1/2) for each group that is 5 to 8 levels less serious
- No increase in units for groups that are 9 or more levels less serious

1. **Adjusted Offense Level for the First Group of Closely Related Counts**

Count number(s): _____

_____ (unit)

2. **Adjusted Offense Level for the Second Group of Closely Related Counts**

Count number(s): _____

_____ (unit)

3. **Adjusted Offense Level for the Third Group of Closely Related Counts**

Count number(s): _____

_____ (unit)

4. **Adjusted Offense Level for the Fourth Group of Closely Related Counts**

Count number(s): _____

_____ (unit)

5. **Adjusted Offense Level for the Fifth Group of Closely Related Counts**

Count number(s): _____

_____ (unit)

6. **Total Units**

(total units)

7. **Increase in Offense Level Based on Total Units (See §3D1.4)**

1 unit:	no increase	2 1/2 - 3 units:	add 3 levels
1 1/2 units:	add 1 level	3 1/2 - 5 units:	add 4 levels
2 units:	add 2 levels	More than 5 units:	add 5 levels

8. **Highest of the Adjusted Offense Levels from Items 1-5 Above**

9. **Combined Adjusted Offense Level (See §3D1.4)**

Enter the sum of Items 7 and 8 here and on Worksheet D, Item 1.

Worksheet C (Criminal History)

Defendant _____

Docket Number _____

Enter the Date Defendant Commenced Participation in Instant Offense (Earliest Date of Relevant Conduct) _____

1. 3 Points for each prior ADULT sentence of imprisonment EXCEEDING ONE YEAR AND ONE MONTH imposed within 15 YEARS of the defendant's commencement of the instant offense OR resulting in incarceration during any part of that 15-YEAR period. (See §§4A1.1(a) and 4A1.2.)
2. 2 Points for each prior sentence of imprisonment of AT LEAST 60 DAYS resulting from an offense committed ON OR AFTER the defendant's 18th birthday not counted under §4A1.1(a) imposed within 10 YEARS of the instant offense; and

2 Points for each prior sentence of imprisonment of AT LEAST 60 DAYS resulting from an offense committed BEFORE the defendant's 18th birthday not counted under §4A1.1(a) from which the defendant was released from confinement within 5 YEARS of the instant offense. (See §§4A1.1(b) and 4A1.2.)
3. 1 Point for each prior sentence resulting from an offense committed ON OR AFTER the defendant's 18th birthday not counted under §4A1.1(a) or §4A1.1(b) imposed within 10 YEARS of the instant offense; and

1 Point for each prior sentence resulting from an offense committed BEFORE the defendant's 18th birthday not counted under §4A1.1(a) or §4A1.1(b) imposed within 5 YEARS of the instant offense. (See §§4A1.1(c) and 4A1.2.)

NOTE: A maximum sum of 4 Points may be given for the prior sentences in Item 3.

Date of Imposition	Offense	Sentence	Release Date**	Guideline Section	Criminal History Pts.
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

* Indicate with an asterisk those offenses where defendant was sentenced as a juvenile.

** A release date is required in only three instances:

- a. When a sentence covered under §4A1.1(a) was imposed more than 15 years prior to the commencement of the instant offense but release from incarceration occurred within such 15-year period;
- b. When a sentence counted under §4A1.1(b) was imposed for an offense committed prior to age 18 and more than 5 years prior to the commencement of the instant offense, but release from incarceration occurred within such 5-year period; and
- c. When §4A1.1(e) applies because the defendant was released from custody on a sentence counted under 4A1.1(a) or 4A1.1 (b) within 2 years of the instant offense or was still in custody on such a sentence at the time of the instant offense (see Item 6).

4. Sum of Criminal History Points for prior sentences under §§4A1.1(a), 4A1.1(b), and 4A1.1(c) (Items 1,2,3).

Worksheet C

Defendant _____

Docket Number _____

5. 2 Points if the defendant committed the instant offense while under any criminal justice sentence (e.g., probation, parole, supervised release, imprisonment, work release, escape status). (See §§4A1.1(d) and 4A1.2.) List the type of control and identify the sentence from which control resulted. Otherwise, enter 0 Points.

6. 2 Points if the defendant committed the instant offense LESS THAN 2 YEARS after release from imprisonment on a sentence counted under §4A1.1(a) or (b), or while in imprisonment or escape status on such a sentence. However, enter only 1 Point for this item if 2 points were added at Item 5 under §4A1.1(d). (See §§4A1.1(e) and 4A1.2.) List the date of release and identify the sentence from which release resulted. Otherwise, enter 0 Points.

7. 1 Point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under §4A1.1(a), (b), or (c) because such sentence was considered related to another sentence resulting from a conviction of a crime of violence. *Provided*, that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion. (See §§4A1.1(f) and 4A1.2.) Identify the crimes of violence and briefly explain why the cases are considered related. Otherwise, enter 0 Points.

Note: A maximum sum of 3 Points may be given for Item 7.

8. **Total Criminal History Points** (Sum of Items 4-7)

9. **Criminal History Category** (Enter here and on Worksheet D, Item 4)

<u>Total Points</u>	<u>Criminal History Category</u>
0-1	I
2-3	II
4-6	III
7-9	IV
10-12	V
13 or more	VI

Worksheet D (Guideline Worksheet)

Defendant _____

District _____

Docket Number _____

1. **Adjusted Offense Level** (From Worksheet A or B)

If Worksheet B is required, enter the result from Worksheet B, Item 9.

Otherwise, enter the result from Worksheet A, Item 5.

2. **Acceptance of Responsibility** (See Chapter Three, Part E)

Enter the applicable reduction of 2 or 3 levels. If no adjustment is applicable, enter "0".

3. **Offense Level Total** (Item 1 less Item 2)

4. **Criminal History Category** (From Worksheet C)

Enter the result from Worksheet C, Item 9.

5. **Terrorism/Career Offender/Criminal Livelihood/Armed Career Criminal/Repeat and Dangerous Sex Offender** (see Chapter Three, Part A, and Chapter Four, Part B)

a. Offense Level Total

If the provision for Career Offender (§4B1.1), Criminal Livelihood (§4B1.3), Armed Career Criminal (§4B1.4), or Repeat and Dangerous Sex Offender (§4B1.5) results in an offense level total higher than Item 3, enter the offense level total. Otherwise, enter "N/A."

b. Criminal History Category

If the provision for Terrorism (§3A1.4), Career Offender (§4B1.1), Armed Career Criminal (§4B1.4), or Repeat and Dangerous Sex Offender (§4B1.5) results in a criminal history category higher than Item 4, enter the applicable criminal history category. Otherwise, enter "N/A."

6. **Guideline Range from Sentencing Table**

Enter the applicable guideline range from Chapter Five, Part A.

Months

7. **Restricted Guideline Range** (See Chapter Five, Part G)

If the statutorily authorized maximum sentence or the statutorily required minimum sentence restricts the guideline range (Item 6) (see §§5G1.1 and 5G1.2), enter either the restricted guideline range or any statutory maximum or minimum penalty that would modify the guideline range. Otherwise, enter "N/A."

Months

☐

Check this box if §5C1.2 (Limitation on Applicability of Statutory Minimum Penalties in Certain Cases) is applicable.

8. **Undischarged Term of Imprisonment** (See §5G1.3)

☐

If the defendant is subject to an undischarged term of imprisonment, check this box and list the undischarged term(s) below.

Defendant _____

Docket Number _____

9. **Sentencing Options** (Check the applicable box that corresponds to the Guideline Range entered in Item 6.)
(See Chapter Five, Sentencing Table)

☐

Zone A If checked, the following options are available (see §5B1.1):

- Fine (See §5E1.2(a))
- "Straight" Probation
- Imprisonment

☐

Zone B If checked, the minimum term may be satisfied by:

- Imprisonment
- Imprisonment of at least one month plus supervised release with a condition that substitutes community confinement or home detention for imprisonment (see §5C1.1(c)(2))
- Probation with a condition that substitutes intermittent confinement, community confinement, or home detention for imprisonment (see §5B1.1(a)(2) and §5C1.1(c)(3))

☐

Zone C If checked, the minimum term may be satisfied by:

- Imprisonment
- Imprisonment of at least one-half of the minimum term plus supervised release with a condition that substitutes community confinement or home detention for imprisonment (see §5C1.1(d)(2))

☐

Zone D If checked, the minimum term shall be satisfied by a sentence of imprisonment (see §5C1.1(f))

10. **Length of a Term of Probation** (See §5B1.2)

If probation is authorized, the guideline for the length of such term of probation is: (Check applicable box)

☐

At least one year, but not more than five years if the offense level total is 6 or more

☐

No more than three years if the offense level total is 5 or less

11. **Conditions of Probation** (See §5B1.3)

List any mandatory conditions ((a)(1)-(9)), standard conditions ((c)(1)-(14)), and any other special conditions that may be applicable:

Defendant _____

Docket Number _____

12. Supervised Release (See §§5D1.1 and 5D1.2)

a. A term of supervised release is: (Check applicable box)

- ☐ Required because a term of imprisonment of more than one year is to be imposed or if required by statute
- ☐ Authorized but not required because a term of imprisonment of one year or less is to be imposed

b. Length of Term (Guideline Range of Supervised Release) (Check applicable box)

- ☐ Class A or B Felony: Three to Five Year Term
- ☐ Class C or D Felony: Two to Three Year Term
- ☐ Class E Felony or Class A Misdemeanor: One Year Term

c. Restricted Guideline Range of Supervision Release

- ☐ If a statutorily required term of supervised release impacts the guideline range, check this box and enter the required term. _____

13. Conditions of Supervised Release (See §5D1.3)

List any mandatory conditions ((a)(1)-(7)), standard conditions ((c)(1)-(15)), and any other special conditions that may be applicable:

14. Restitution (See §5E1.1)

- a. If restitution is applicable, enter the amount. Otherwise enter "N/A" and the reason: _____
- b. Enter whether restitution is statutorily mandatory or discretionary: _____
- c. Enter whether restitution is by an order of restitution or solely as a condition of supervision. Enter the authorizing statute: _____

15. Fines (Guideline Range of Fines for Individual Defendants) (See §5E1.2)

- | a. Special fine provisions | <u>Minimum</u> | <u>Maximum</u> |
|---|----------------|----------------|
| <input type="checkbox"/> Check box if any of the counts of conviction is for a statute with a special fine provision. (This does not include the general fine provisions of 18 USC § 3571(b)(2), (d)) | | |
| Enter the sum of statutory maximum fines for all such counts | | \$ _____ |
| b. Fine Table (§5E1.2(c)(3)) | | |
| Enter the minimum and maximum fines | \$ _____ | \$ _____ |
| c. Guideline Range of Fines:
(determined by the minimum of the fine table (Item 15(b))
and the greater maximum above (Item 15(a) or 15(b))) | \$ _____ | \$ _____ |
| d. Ability to Pay | | |
| <input type="checkbox"/> Check this box if the defendant does not have an ability to pay. | | |

Worksheet D

Defendant _____

Docket Number _____

16. Special Assessments (See §5E1.3)

Enter the total amount of special assessments required for all counts of conviction:

- \$25 for each misdemeanor count of conviction
- Not less than \$100 for each felony count of conviction

\$_____

17. Additional Factors

List any additional applicable guidelines, policy statements, and statutory provisions. Also list any applicable aggravating and mitigating factors that may warrant a sentence at a particular point either within or outside the applicable guideline range. Attach additional sheets as required.

This image shows a blank sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

Completed by _____

Date _____

SENTENCING TABLE

(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points)					
		I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B	9	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30
Zone C	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
Zone D	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life